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268 NLRB No. 69

D--1141  
Nashville, TN

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FISK UNIVERSITY

and

Case 26--CA--10219

DISTRICT 65, UAW LOCAL 19A

DECISION AND ORDER

Upon a charge filed on 20 May 1983 by District 65, UAW Local 19A, herein called the Union, and duly served on Fisk University, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Acting Regional Director for Region 26, issued a complaint on 3 June 1983 against Respondent alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that since on or about February 1972, and at all times material herein, the Union has been the designated exclusive collective-bargaining representative of Respondent's employees in the following appropriate unit:

All full-time, regular, clerical, fiscal, and technical employees employed at Fisk University; Nashville, Tennessee, excluding supervisors as defined by the Act.

Since about February 1972, Respondent has recognized the Union as the exclusive collective-bargaining representative of the employees in the above-

described unit. The parties have executed successive collective-bargaining agreements, the most recent being effective from 16 March 1982 to 30 June 1983. On 22 October 1982 the Union filed a unit clarification petition, Case 26--UC--98, seeking the inclusion of, inter alia, the position of junior accountant. On 19 November 1982 the Regional Director for Region 26 issued a ''Decision and Clarification of Bargaining Unit,'' finding that the junior accountant possesses a sufficient community of interest with the unit employees to warrant inclusion in the existing unit. Thereafter, on 1 December 1982 Respondent filed a timely request for review of the ''Decision and Clarification of Bargaining Unit,'' contending that the Regional Director erred by including the position of junior accountant. Respondent asserted that the record indicates that the junior accountant is a confidential and professional employee. On 7 January 1983 the Board denied Respondent's request for review. By letter dated 10 January 1983, the Union requested Respondent to bargain as to the wages, hours, and other terms and conditions of employment. By letter dated 14 February 1983, Respondent refused and has since failed and refused to recognize and bargain with the Union with respect to the inclusion of the position of junior accountant as part of the existing bargaining unit. On 15 June 1983 Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On 27 June 1983 counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on 7 July 1983, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed an opposition to the Motion for Summary Judgment.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on the Motion for Summary Judgment

In its answer to the complaint Respondent admits all the factual allegations, but denies that its refusal to bargain collectively relative to the inclusion of the junior accountant as part of the existing bargaining unit constitutes a violation of the Act. Respondent affirmatively alleges that its 8 November 1982 letter of position to the Regional Director and its subsequent request for review of the Regional Director's "'Decision and Clarification of Bargaining Unit,'" which are attached to and specifically made part of Respondent's answer, set forth its rationale for its contention that the position of junior accountant should not be included within the bargaining unit. In its opposition to the Motion for Summary Judgment Respondent repeats its assertion that the position of junior accountant is not appropriately included within the bargaining unit, but limits its arguments to the contention that the junior accountant is a confidential employee.

Review of the record herein, as noted above, reveals that the Regional Director for Region 26 issued a "'Decision and Clarification of Bargaining Unit'" on 19 November 1982, finding that the junior accountant has insufficient characteristics of either professional or confidential status to justify exclusion from the bargaining unit. Moreover, the Regional Director concluded that the junior accountant shared a community of interest with bargaining unit employees, warranting inclusion within the existing unit. Following Respondent's request for review of the Regional Director's decision, the Board denied review, thereby approving the Regional Director's inclusion of the position within the existing unit. As indicated above, Respondent does not deny the essential elements of its refusal to bargain, but claims only

that inclusion of the junior accountant position is improper. It thus appears that Respondent is attempting in this proceeding to relitigate issues fully litigated and determined in the representation proceeding.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.<sup>1</sup>

All issues raised by Respondent in this proceeding were fully litigated in the prior representation proceeding, and Respondent does not offer to adduce any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding concerning the underlying representation matter.<sup>2</sup>

On the basis of the entire record, the Board makes the following:

#### Findings of Fact

##### I. The Business of Respondent

Respondent is engaged in the operation of a private, nonprofit university in Nashville, Tennessee. During the 12-month period ending 31 December 1982, a representative period, Respondent, in the course and conduct of its operations, received gross revenues in excess of \$1 million, which amount excludes contributions which, because of limitation by the grantor, are not

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<sup>1</sup> See Pittsburgh Glass Co. v. NLRB, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

<sup>2</sup> Chairman Dotson did not participate in the underlying representation proceeding.

available for operating expenses. In addition, during the same period, Respondent, in the course and conduct of its operations described above, purchased and received at its Nashville, Tennessee, facility products, goods, and materials valued in excess of \$5,000 directly from points outside the State of Tennessee.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

## II. The Labor Organization Involved

District 65, UAW Local 19A, is a labor organization within the meaning of Section 2(5) of the Act.

## III. The Unfair Labor Practices

### A. The Representation Proceeding

#### 1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All full-time, regular, clerical, fiscal, and technical employees employed at Fisk University; Nashville, Tennessee, excluding supervisors as defined by the Act.

#### 2. The Union's representative status

Since about February 1972, and continuing to date, the Union has been the designated exclusive collective-bargaining representative of Respondent's employees in the above-described unit. Since approximately February 1972, Respondent has recognized the Union as such representative and has confirmed this recognition in successive collective-bargaining agreements, the most recent of which was effective for the period 16 March 1982 to 30 June 1983.

Following the Union's petition for unit clarification in Case 26--UC--98, the Regional Director for Region 26 rendered a "'Decision and Clarification of Bargaining Unit,'" in which he specifically included the position of junior accountant within the existing unit. Thereafter, on 7 January 1983 the Board approved the Regional Director's decision by denying Respondent's request for review of the Regional Director's decision.

The Union was designated, recognized, and continues to be the exclusive representative of the employees in the above-described unit, including the position of junior accountant, within the meaning of Section 9(a) of the Act.

#### B. The Request To Bargain and Respondent's Refusal

Commencing on or about 10 January 1983, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit, including the junior accountant. Commencing on or about 14 February 1983, and continuing at all times thereafter to date, Respondent had refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit, particularly with respect to the position of junior accountant.

Accordingly, we find that Respondent has, since 14 February 1983, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

#### IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among

the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

#### V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, as clarified, and, if an understanding is reached, embody such understanding in a signed agreement.

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

#### Conclusions of Law

1. Fisk University is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. District 65, UAW Local 19A, is a labor organization within the meaning of Section 2(5) of the Act.
3. All full-time, regular, clerical, fiscal, and technical employees employed at Fisk University, Nashville, Tennessee, excluding supervisors as defined by the Act, constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.
4. Since February 1972, the above-named labor organization has been and now is the designated exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.
5. By refusing on or about 14 February 1983, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the

appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

#### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Fisk University, Nashville, Tennessee, its officers, agents, successors, and assigns, shall.

1. Cease and desist from.

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with District 65, UAW Local 19A, as the exclusive bargaining representative of its employees in the following appropriate unit:

All full-time, regular, clerical, fiscal, and technical employees employed at Fisk University; Nashville, Tennessee, excluding supervisors as defined by the Act.

(b) Refusing to bargain collectively with the Union regarding the position of junior accountant.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.



2. Take the following affirmative action which the Board finds will effectuate the policies of the Act.

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit, specifically including the position of junior accountant, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its facility in Nashville, Tennessee, copies of the attached notice marked "'Appendix.'"<sup>2</sup> Copies of said notice, on forms provided by the Regional Director for Region 26, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

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<sup>2</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "'POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD'" shall read "'POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.'"

(c) Notify the Regional Director for Region 26, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C.

30 December 1983

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Donald L. Dotson, Chairman

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Robert P. Hunter, Member

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Patricia Diaz Dennis, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

## APPENDIX

## NOTICE TO EMPLOYEES

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with District 65, UAW Local 19A, as the exclusive representative of the employees in the bargaining unit described below, including specifically the position of junior accountant.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All full-time, regular, clerical, fiscal, and technical employees employed at Fisk University; Nashville, Tennessee, excluding supervisors as defined by the Act.

\_\_\_\_\_  
FISK UNIVERSITY

\_\_\_\_\_  
(Employer)

Date ----- By -----  
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Mid-Memphis Tower Building, Suite 800, 1407 Union Avenue, P.O. Box 41559, Memphis, Tennessee 38104, Telephone 901--521--2687.